Supreme Court, U.S.
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No. 98-677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

THOMAS W. ARMSTRONG, D.D.S.,

Petitioner,

vs.

NORTH CAROLINA STATE BOARD
OF DENTAL EXAMINERS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

RESPONDENT'S BRIEF IN OPPOSITION

M. DENISE STANFORD
Counsel of Record
RALPH McDONALD
BAILEY & DIXON, L.L.P.
Attorneys for Respondent
P.O. Box 1351
Raleigh, North Carolina 27602
(919) 828-0731

150159

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Respondent respectfully submits that when the facts are accurately presented, the real question is:

Does suspending the license of a dentist who without actual knowledge hires an unlicensed dentist lack rational connection to fitness to practice dentistry and therefore violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

STATEMENT OF THE CASE

A. The Petition misrepresents the record below.

Petitioner misrepresents the facts in this case. In his Petition, Petitioner erroneously contends that the evidence before the North Carolina State Board of Dental Examiners (Dental Board) showed that Petitioner reasonably believed that Dr. Conger was provisionally licensed to practice dentistry. Petitioner had met Dr. Conger three months before he hired him and did not know him well. Petitioner did not ask to see Dr. Conger's license nor did he call the Dental Board to verify that Dr. Conger was licensed. The evidence was that Petitioner took Dr. Conger's word that he was provisionally licensed at face value. Contrary to Petitioner's assertion, the record shows that Petitioner did not exercise reasonable care to determine whether Dr. Conger was licensed. If Petitioner had called the Board office, he would have learned that Petitioner was not licensed. In fact, the Dental Board's staff first learned that Dr. Conger was practicing dentistry without a license when it received a telephone call from a pharmacist requesting verification that Dr. Conger was licensed to practice dentistry in North Carolina. After determining that Dr. Conger was not licensed, an investigation was initiated and it was determined that Dr. Conger was practicing in Petitioner's practice. A Board investigator subsequently traveled to Petitioner's office and told Dr. Conger to immediately cease the practice of dentistry because he was not licensed to practice in North Carolina.

REASONS FOR DENYING THE WRIT

The Petitioner's claim that suspending the license of a dentist who without actual knowledge or negligence hires a competent but unlicensed dentist lacks a rational connection to fitness to practice dentistry and therefore violates the Due Process Clause of the United States Constitution does not

warrant review by this Court. The question presented misrepresents the facts in this case. The decision below was a plainly correct application of settled law.

"[T]here is no right to practice medicine which is not subordinate to the police power of the states." *Lambert v. Yellowley*, 272 U.S. 581, 596 (1926).

> It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power. The state's discretion in that field extends naturally to the regulation of all professions concerned with health.

Barsky v. Board of Regents, 347 U.S. 422, 449 (1954). "The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure" such benefits. *Dent v. West Virginia*, 129 U.S. 114, 122 (1889).

G.S. § 90-22 sets out the purpose of the legislature in enacting the Dental Practice Act:

> [t]he practice of dentistry in the State of North Carolina is hereby declared to affect the public health, safety and welfare and to be subject to regulation and control in the public interest. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and *that only qualified persons be permitted to practice dentistry in the State of North Carolina.* (Emphasis added).

The legislature specifically declared that the Dental Practice Act "shall be liberally construed" to instill public confidence and ensure quality dental care. *Id.* With this end in mind, the Legislature enacted G.S. § 90-41(a)(13). A license from the Dental Board is required in order to practice dentistry and signifies that the practitioner has demonstrated good moral character and successfully completed an examination administered by the Dental Board demonstrating his "proficiency in the knowledge and practice of dentistry. . . ." G.S. § 90-30. The legislature regulates the practice of dentistry to protect the public health, safety, and welfare. Prohibiting the employment of unlicensed dentists legitimately furthers the legislature's goal of protecting the public.

Another legitimate governmental objective of G.S. § 90-41(a)(13) is to maintain the integrity of the licensing system. The licensing requirements are closely tied with how the public perceives the integrity of the dental profession as a whole. The public depends on the Dental Board to examine candidates for the profession to determine their fitness for the practice of dentistry. It is in the best interest of all licensed dentists and the public that the integrity of the licensing system be maintained. G.S. § 90-41(a)(13) has a legitimate purpose, to protect the public from the unprofessional, improper, unauthorized, and unqualified practice of dentistry and to maintain the integrity of the licensing system.

In this case, the question is whether it is reasonable to discipline a dentist for employing an unlicensed dentist when the employing dentist has no knowledge that the employed dentist is unlicensed. Because G.S. § 90-41(a)(13) protects the public health and safety, it rightfully places the burden on employing dentists to exercise due diligence in hiring dentists to practice dentistry. It is not unreasonable or irrational to require hiring dentists to check into the background of their

employees who practice dentistry to ensure that they do indeed have a license to practice dentistry. To place the burden elsewhere would be unreasonable. The public is not protected if the hiring dentist fails to inquire.

Although Petitioner had no actual knowledge that Dr. Conger did not have a provisional license, Petitioner made no effort to determine whether Petitioner was licensed. Petitioner did not ask to see a license nor did he write to the Board requesting verification of licensure. Petitioner did not call the Board office to verify Dr. Conger's licensure. G.S. § 90-33 requires all dental licenses to be displayed in a conspicuous place in the license holder's office. Although Dr. Conger practiced dentistry in Petitioner's practice for over a month, Petitioner did not require Dr. Conger to display his provisional license. If Petitioner had required Dr. Conger to display his license, he would have determined that Dr. Conger indeed did not possess the provisional license. In the present case, Petitioner could have determined that Dr. Conger was not licensed, but chose not to take any action to determine Dr. Conger's licensure status. Petitioner's failure to act does not render the statute unconstitutional.

In enacting G.S. § 90-41(a)(13), the legislature has required all employing dentists to exercise due diligence to ensure that only qualified persons practice dentistry in North Carolina. Such a requirement is a reasonable means to effect the State's proper objective of the statute: to protect the public and maintain the integrity of the licensing system. Therefore, G.S. § 90-41(a)(13) is constitutional as applied in the present case. If Petitioner had exercised due diligence in requiring Dr. Conger to display his license and had called the Board to verify Dr. Conger's licensure status, he would have discovered that Dr. Conger was not licensed. Even if knowledge is required under G.S. § 90-41(a)(13), Petitioner had constructive knowledge that Dr. Conger was not licensed.

G.S. § 90-41(a)(13) was enacted to protect the public from unlicensed and presumably incompetent dentists. It is the Board's responsibility to examine all dentists to determine their fitness to practice and to grant a license upon successful completion of such examination. Placing the burden upon the hiring dentist to determine his employee's licensure status is a rational means to effect the State's proper purpose of protecting the public.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

M. DENISE STANFORD
Counsel of Record
RALPH McDONALD
BAILEY & DIXON, L.L.P.
Attorneys for Respondent
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Raleigh, North Carolina 27602
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